

FILE COPY

Office - Supreme Court, U
FILED

JUN 5 1948

CHARLES ELMORE CROFT
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1947

No.



74

ST. REGIS PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

↓
HORACE R. LAMB,
Attorney for Petitioner.

Dated: June 2, 1948.

INDEX

	PAGE
Caption	1
Opinion Below	1
Jurisdiction	1
Summary Statement of the Case.....	2
Relevant Parts of Statutes Involved.....	6
Questions Presented	14
Specification of Error to Be Urged.....	14
Reasons for Petition	28
Conclusion	32

Table of Authorities Cited

CASES

<i>Davis v. Mills</i> , 194 U. S. 451.....	27
<i>International Paper Company v. United States</i> , 282 U. S. 399	17, 18, 19, 20, 21, 27, 28, 31, 32
<i>Morrisdale Coal Co. v. United States</i> , 55 C. Cls. 310, affd. 259 U. S. 188	17, 21
<i>Omnia Commercial Co. v. United States</i> , 261 U. S. 502	17, 18
<i>Portsmouth Harbor Land & Hotel Company v. United States</i> , 260 U. S. 327.....	23
<i>Pumpelly v. Green Bay Company</i> , 13 Wall. 166.....	24
<i>Royal Holland Lloyd v. United States</i> , 73 C. Cls. 772..	21

	PAGE
<i>United States v. Causby</i> , 328 U. S. 256.....	17, 21, 22, 23, 24, 27, 32
<i>United States v. General Motors Corporation</i> , 323 U. S. 373	17, 21, 24, 32
<i>United States v. Lynah</i> , 188 U. S. 445.....	24
<i>United States v. Welch</i> , 217 U. S. 333.....	24
<i>United States v. Powelson</i> , 319 U. S. 266.....	24
<i>United States v. Dickinson</i> , 331 U. S. 745.....	25, 27, 32

Statutes

Fifth Amendment to the Federal Constitution.....	6
Tucker Act (Judicial Code, Sec. 145, subdivision (1), Act of March 3, 1911, C. 231, Sec. 145, 36 Stat. 1136; Act of June 10, 1921, C. 18, Sec. 304, 42 Stat. 24)	6
First War Powers Act of 1941 (Act of December 18, 1941, C. 593, 55 Stat. 838, 50 U. S. C. A. App. Sec. 601)	7
Second War Powers Act of 1942 (Act of March 27, 1942, C. 199, 56 Stat. 176, 50 U. S. C. A. App. Sec. 632)	7, 8
War and Defense Contract Acts (Act of June 28, 1940, C. 440, 54 Stat. 676, 50 U. S. C. A. App. Sec. 1152, subsection (a), subdivisions (1), (2) and (8))	8, 9

ORDERS

War Production Board General Preference Order M-251 (Fed. Reg. October 20, 1942, pp. 8424-8425, Document 42-10,519)	9, 10, 11, 12, 13
(The pertinent provisions of Schedule No. 1 to Gen- eral Preference Order M-251 and the specific direc- tives to petitioner thereunder are printed as ex- hibits to the amended petition, R. 10 to 16.)	

Supreme Court of the United States

OCTOBER TERM, 1947

No.

ST. REGIS PAPER COMPANY, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To: *The Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, St. Regis Paper Company, prays that a writ of certiorari issue herein to review the judgment of the Court of Claims sustaining the respondent's demurrer to petitioner's amended petition and dismissing the petition.

Opinion Below

The decision and opinion of the Court of Claims appears at R. 24, and is reported unofficially in 76 F. Supp. at page 831.

Jurisdiction

The judgment of the Court of Claims was entered April 5, 1948 (R. 30). The jurisdiction of this Court is invoked

under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U.S.C.A. Section 288(b).

Summary Statement of the Case

Petitioner, a New York corporation, sued in the Court of Claims for just compensation under the Fifth Amendment for the taking for a public use, for the period of 17 months from November 1, 1942 to April 1, 1944, of the temporary use of petitioner's pulp plant at Tacoma, Washington, and the petitioner's inventory and supply of pulpwood located at such plant and to be used as the essential raw material therein.

The petition alleges that the taking was the direct and intended effect of the War Production Board's General Preference Order M-251, the Schedule No. 1 thereto and seven specific directives thereunder issued to petitioner in October, 1942, pursuant to which petitioner's pulp plant was shut down for such 17 months period (R. 2-9).

The Board's order and the directives were issued pursuant to the provisions of the First War Powers Act of 1941 (Act of December 18, 1941, C. 593, 55 Stat. 838, 50 U.S.C.A. App. Sec. 601); the Second War Powers Act of 1942 (Act of March 27, 1942, C. 199, 56 Stat. 176, 50 U.S.C.A. App. Sec. 632) and the War and Defense Contract Acts (Act of June 28, 1940, C. 440, 54 Stat. 676, 50 U.S.C.A. App. Sec. 1152, subsection (a), subdivisions (1), (2) and (8)).

In these statutes, particularly the Second War Powers Act, 1942, Congress granted adequate power to the War Production Board as the "board authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, together with any per-

sonal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes * * *."

At the time of the issuance of the Board's order and directives, and for many years prior thereto, petitioner was engaged in the business of manufacturing and selling bleached and unbleached kraft pulp, paper and other paper products, and owned a large manufacturing plant in Tacoma, Washington, with machinery, apparatus and necessary facilities and equipment to manufacture from pulp specie logs approximately 300 tons per day of bleached and unbleached kraft pulp (R. 1, 2). In October, 1942 the plant was operating at capacity and petitioner had in inventory and under contract for delivery at its pulp plant a supply of pulpwood logs for continued operation at capacity production. The right to consume and process pulpwood is essential to the continued use and operation of petitioner's plant, and it is not adaptable to any use other than the manufacture of pulp, except that in a shutdown condition parts thereof are usable for storage purposes (R. 1 to 2).

The Board's General Preference Order No. M-251 (quoted in part in the petition below (R. 2-5) and printed at length *infra* at pp. 9-14) provided, among other things, that the Director General for Operations under such order could specifically direct petitioner, as a person holding a supply of pulpwood at its plant in the State of Washington (being in the designated area of shortage), to hold such supply "as a 'Reserve Supply', available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quan-

ties into specific products". The Director General could also "Direct that no person * * * may consume, process, deliver or accept any delivery of pulpwood * * * except upon specific authorization or direction by the Director General for Operations * * *." Further, he could limit or prohibit particular uses of pulpwood, among other things, "to insure the satisfaction of requirements, direct or indirect, for the defense of the United States * * *" and give such directions "in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, *and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements * * *.*" (Sec. 313.1(d) (2), (3) and (4)) (Italics supplied.)

It is the petitioner's contention, as alleged in the petition below, that General Preference Order M-251, Schedule No. 1 thereto and the specific directives issued to petitioner thereunder, in effect, constituted a requisitioning by the Government of the temporary use of petitioner's pulp mill and the complete control of petitioner's inventory and supply of pulpwood logs during the period November 1, 1942 to April 1, 1944.

The Schedule No. 1 (R. 10, Exhibit A to amended petition) and the specific directives issued to petitioner under M-251 allowed petitioner to consume from its inventory and supply of pulpwood sufficient pulpwood to operate its mill for the balance of the month of October and directed that for the period from November 1, 1942 to April 1, 1944 no pulpwood be consumed or processed in petitioner's mill R. 12 to 16, Exhibits B to H, inclusive, and R. 5, 6 and 7, paragraphs 8 to 10 and 13 of amended petition).

In addition, Schedule No. 1 declared the Puget Sound area (in which petitioner's plant is located) a critical area and contained provisions freezing pulpwood logs in the hands of holders in such area (R. 10 to 12). Furthermore, the specific directives issued to petitioner diverted to other manufacturers in the area pulpwood logs then held in petitioner's inventory (R. 14 to 16, Exhibits E, F, G and H to amended petition).

Petitioner protested the order and determination of the War Production Board and requested that it be permitted to continue in the manufacture of nitrating pulps or other pulps (R. 16, Exhibit I). Such protest was rejected, and in its letter of rejection to petitioner the Board's representative stated, in part (R. 22):

"We are confident that you realize that we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative. Under existing conditions, however, we must confirm our decision to deny authorization to your Tacoma mill to consume any pulpwood logs during November." (R. 6, 7, 22, amended petition, paragraphs 11, 12, and Exhibit J) (Italics supplied.)

The petition also shows that, as the direct, necessary and intended effect of the War Production Board's order and directives, petitioner's pulp plant at Tacoma was completely shut down during all of the period from November 1, 1942 to April 1, 1944 (R. 7, paragraph 13).

The petition further alleges that petitioner's right to consume and process pulpwood and to use and operate its plant during said period are property and property rights within the meaning of the Fifth Amendment, and that by reason of the War Production Board's action, as afore-

said, petitioner's property and rights were taken for a public use for which the respondent became obligated to make fair and reasonable compensation.

It is alleged, finally, that during the period November 1, 1942 to April 1, 1944 in the Puget Sound area there were no sales or leases of the temporary use of a pulp mill of the type and capacity of petitioner's pulp plant, or of the right to consume or process pulpwood therein; that petitioner sustained out-of-pocket shutdown expenses of \$376,754.86 (after crediting amounts received during the shutdown period as rent of storage space and other income), deterioration and depreciation in the amount of \$228,173.14 and lost profits of \$2,694,686.83, and that petitioner, therefore, claims the total of said amounts as the just compensation to which it is entitled (R. 8, 9).

Relevant Parts of Statutes Involved

Fifth Amendment to the Federal Constitution (last clause):

“* * * nor shall private property be taken for public use, without just compensation.”

Tucker Act (Judicial Code, Sec. 145, subdivision (1), Act of March 3, 1911, C. 231, Sec. 145, 36 Stat. 1136; Act of June 10, 1921, C. 18, Sec. 304, 42 Stat. 24):

“The Court of Claims shall have jurisdiction to hear and determine the following matters:

“(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for dam-

ages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *"

First War Powers Act, 1941 (Act of December 18, 1941, C. 593, 55 Stat. 838; 50 U.S.C.A. App. Sec. 601):

"For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 * * *."

Second War Powers Act, 1942 (Act of March 27, 1942, C. 199, 56 Stat. 176; 50 U.S.C.A. App. Sec. 632):

"The Act of July 2, 1917 (40 Stat. 241) entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.' "

War & Defense Contract Acts (Act of June 28, 1940, C. 440, 54 Stat. 676; 50 U.S.C.A. App. Sec. 1152, subdivision (a) (1)).

"Whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, con-

struction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export:
 * * *

* * * *

“(2) Material entitled to priority in delivery
 * * * *

“Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; * * *
 * * * *

“(8) Exercise of powers by President

The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.”

General Preference Order M-251 (Fed. Reg. October 20, 1942, pp. 8424-8425, Document 42-10,519).

“The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has

created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote national defense:

“§3113.1 *General Preference Order M-251*—(a) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

“(b) *Definitions.* For the purpose of this order:

“(1) ‘Person’ means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

“(2) ‘Pulpwood’ includes wood of any species and in any form commonly delivered to a manufacturer of woodpulp for the manufacture of woodpulp, except those species and forms defined in and subject to the following orders of the War Production Board: M-186, M-228, M-229 and M-234.

“(3) A ‘holder of pulpwood’ is any person who holds or accumulates pulpwood for manufacture by himself into woodpulp.

“(4) To ‘hold’ or ‘accumulate’ pulpwood means to have or obtain control of a supply of pulpwood whether by production or purchase directly by the holder, by production or purchase by an affiliate or subsidiary or by one branch, division or section of a single enterprise or by production or purchase by any other person for delivery to or for the account of the holder.

“(c) *Reports of receipts, consumption and inventory of pulpwood.* Each producer of woodpulp

shall on or before the 5th day of each month (beginning with the 5th day of November, 1942) file with the Pulp and Paper Branch of the War Production Board, Reference M-251, for each mill operated by him located elsewhere in the United States than in the states of Washington and Oregon, Form PD-656, and for each mill operated by him located in the state of Washington or the state of Oregon, Form PD-661, showing the monthly receipts, consumption and inventory of pulpwood at and for such mill, according to the instructions accompanying such form.

“(d) *Control of pulpwood in areas of shortage.* Whenever the Director General for Operations determines that there prevails in any area a shortage in the supply of any type or types of pulpwood required for the production of materials needed in the public interest and for national defense, he may issue a schedule defining such area and such type or types of pulpwood, and may thereupon, according to the degree of the shortage and the immediacy of the need, and as specified in such schedule,

“(1) Allocate specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons;

“(2) Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood of the type or types defined a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a ‘Reserve Supply’, available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quantities into the specific products, and the Director General for Operations may in addition

from time to time allocate specific quantities of any pulpwood of the type or types defined held or accumulated in such area, although not a part of such 'Reserve Supply', from and to specific persons; and provide procedures for applying for and granting such authorizations, directions and allocations;

"(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction; and/or

"(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. In any allocation, authorization or direction issued by the Director General for Operations pursuant to clause (1), (2) or (3) of the foregoing paragraph, the Director General for Operations may require the person to whom such allocation, authorization or direction is issued to manufacture, from the pulpwood which is the subject thereof, particular types and quantities of woodpulp or other wood product or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. Such allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, may be made in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood

and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.

“(e) *Miscellaneous provisions*—(1) *Records*. All persons affected by this order shall keep and preserve, for not less than 2 years, complete records concerning their receipts, inventories, and consumption or other disposition of pulpwood.

“(2) *Audit and inspection*. All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

“(3) *Reports*. All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time request.

“(4) *Violations*. Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control and may be deprived of priorities assistance.

“(5) *Communications*. All reports required to be filed hereunder and all communications concerning this order shall, unless otherwise directed, be addressed to: Pulp and Paper Branch, War Production Board, Washington, D. C., Ref.: M-251.

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2(a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

“Issued this 19th day of October 1942.

ERNEST KANZLER,
Director General for Operations.

[F. R. Doc. 42-10519; Filed, October 19, 1942; 11:37 a.m.]”

Schedule No. 1 to General Preference Order M-251 and the specific directives to petitioner are set forth in the amended petition (paragraphs 7 *et seq.* and Exhibits A, B, C, D, E, F, G and H thereto).

Questions Presented

The ultimate question is whether the allegations of the amended petition are sufficient to state a claim for just compensation for the taking of petitioner's private property for a public use within the meaning of the Fifth Amendment to the Constitution. More specifically, the question is whether, under the circumstances alleged in the amended petition, the effect of General Preference Order M-251 and the specific directives of the War Production Board to the petitioner constituted a requisition of the temporary use of petitioner's pulp-mill and inventory of pulpwood logs.

Specification of Error to be Urged

The Court of Claims erred:

(1) In holding that there was no exercise by the government of proprietary rights over petitioner's private prop-

erty. The opinion shows a failure on the part of the Court to consider the following:

(a) The statutory power conferred upon the War Production Board (as a "board" authorized by the president) by the Second War Powers Act to acquire for war purposes "the temporary use" of any real property "or other interest therein, together with any personal property located thereon or used therewith". In the opinion of the Court there is no mention of this statutory power.

-(b) The purpose and provisions, as well as the scope and effect, of the Board's General Preference Order M-251, Schedule No. 1 thereto and the specific directives issued to petitioner thereunder. The provisions of the order and directives are not discussed in any detail in the opinion. Their effect was not limited, as stated in the Court's opinion (R. 24), to the "freezing" of the sources from which petitioner could procure pulpwood from November 1, 1942 to April 1, 1944. The petition makes no reference whatsoever to any source of supply of pulpwood or to the interference with any such source by reason of the Board's order and directives. The petition does allege, however, that on October 23, 1942, petitioner "had in inventory at said pulp plant and under contract for delivery to the pulp plant a supply of pulpwood logs for the continued operation of said pulp plant at capacity production" (R. 2).

(c) The dominion and control which the War Production Board acquired over petitioner's inventory and supply of essential raw material, pulpwood.

The Court of Claims erroneously suggests that the order and directives of the Board permitted petitioner to consume logs on hand in some kind of manufacture other than

that in which it was then (October 1942) engaged. In the court's opinion, it was said (R. 24):

“Plaintiff had some logs on hand, but it was not permitted to consume these in the kind of manufacturing in which it was then engaged.”

The court overlooked the alleged fact that the order and directives of the War Production Board did not permit the petitioner to consume *any* logs or to engage in *any* type of manufacture in its Tacoma mill.

(d) The direct and intended effect of such control upon the use of petitioner's plant and facilities in the processing of pulpwood into pulp, which was the only use (other than as storage space) to which petitioner's property could be put. The Board's letter to the petitioner states “we regard the closing down of the Tacoma mill as a serious and regrettable action *which we would not have taken had we seen any reasonable alternative*” (R. 22) (*Italics supplied*). The purpose and effect of the Board's action was to deprive petitioner of the temporary use of its mill and its entire inventory of logs so that its skilled employees and essential raw material would thereupon become available for use by other mills designated by the Board; and the petition so alleges (R. 7-8).

(2) In holding that the allegations of the petition are insufficient “under the limitations set out and defined in the decisions of the Supreme Court, this court [*i.e.*, the Court of Claims] and other courts of the country to establish such a taking” of private property for a public purpose (R. 25).

The decisions cited in the opinion of the Court of Claims do not, we respectfully submit, contain any “limitations” which appear to preclude petitioner's claim. The

recent decisions of this Court, such as *United States v. Causby*, 328 U. S. 256; *United States v. General Motors Corporation*, 323 U. S. 373, and the earlier decisions upon which those decisions rested, are not discussed in the opinion of the Court of Claims. The principal decisions upon which that court relied are cases of frustration of contract, such as *Omnia Commercial Co. v. United States*, 261 U. S. 502, and *Morrisdale Coal Co. v. United States*, 55 C. Cls. 310, affd. 259 U. S. 188, none of which have any application here.

More important, however, it is impossible, we believe, to reconcile the holding below with the decision of this Court in *International Paper Company v. United States*, 282 U. S. 399. In that case the International Paper Company's right to the use of water power, which was essential to the continued operation of its paper mill at Niagara Falls, New York, was diverted by government order to a privately owned and operated hydro-electric power company to enable the power company to increase its output and furnish additional electric power to manufacturers, other than the Paper Company, having plants at Niagara Falls and designated by the War Department, for use by such other manufacturers in the manufacture of products needed for national defense in World War I. The effect of the diversion of the water power was to cause the International Company's paper mill at Niagara Falls to be shut down.

The International Company claimed compensation in the total amount of \$590,732.20, of which \$304,685.36 represented the out-of-pocket or direct overhead expenses on account of the shutdown, and the balance of approximately \$289,000 represented loss of profits which would have been earned if the mill had operated during the shut-

down period. The International Company urged, among other things:

“* * * In depriving the claimant of its [water] rights, the United States took something more than the water rights *in vacuo*; it caused the mill to shut down completely, resulting in unavoidable expense and prevented the realization of the profits which the claimant would otherwise have enjoyed. For this the claimant is entitled to be reimbursed.” (Claimant’s Request for Special Findings of Fact and Brief, Court of Claims, at page 282)

After trial, and upon special findings of fact, the Court of Claims determined, as a conclusion of law, that the International Company was not entitled to recover compensation and dismissed the petition. The dismissal was upon the theory that the diversion of the water was, at most, a frustration of a contract right for which there was no compensation, citing *Omnia Commercial Co. v. United States*, *supra*, 261 U. S. 502.

This Court (opinion by Holmes, J.) reversed the judgment of the Court of Claims dismissing the petition and held that the Paper Company was entitled to compensation of \$304,685.36 as the Paper Company’s out-of-pocket and overhead shutdown expense during the period while the Government’s directive forced the closing of the paper mill.

In the Court’s opinion, rejecting the argument of the Government that there was no taking, it was said (at page 407):

“* * * It is true that petitioner did not come within the scope of the Government’s written promise [to the Power Company] to pay. But the Government purported to be using its power of

eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power (citing cases). Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power. * * *

"We perceive no difficulty arising from the case of *Omnia Commercial Co. v. United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence.
* * *

It appears that the International Company's proof of loss of profits as a result of the shutdown of the paper

mill was not considered satisfactory and, upon the appeal, that element of the claim for compensation was abandoned. It is significant, however, that in sustaining the claim for compensation neither the claimant nor this Court attempted to measure the compensation by the value of the water power, as such. This Court accepted the claimant's view that the taking of the water rights caused the mill to shut down completely, and that the shutdown resulted in unavoidable expense to the claimant for which the claimant was entitled to reimbursement. In the course of the opinion of the Court it was expressly stated (282 U. S. 399, at page 406):

“* * * On February 7, 1918 its [petitioner's] use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 [diverting petitioner's water for power purposes] was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it \$304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.”

In reversing the judgment of the Court of Claims, therefore, this Court upheld the right to compensation for the deprivation of the use of the paper mill which was the direct and necessary result of the taking of the International Paper Company's water power right.

In the instant case the Government's directives to this petitioner to maintain its holdings of pulp as a “‘Reserve Supply’ available for disposition by the War Production Board,” and the actual diversion of portions of petitioner's inventory of logs to other manufacturers, deprived this petitioner of the temporary use of its pulp plant as effectively and completely as did the War Department's

directive in the *International Paper Company* case, which, for a temporary period, diverted the Paper Company's water power to a privately owned and operated power company. The fair compensation for the deprivation of petitioner's private property may be measured here, as it was in the *International Paper Company* case, by the out-of-pocket shutdown expenses of the petitioner's pulp mill and the provable lost profits of this petitioner.

We respectfully submit, therefore, that the decision of this Court in *International Paper Company v. United States*, *supra*, is a controlling precedent and that the decision of the Court of Claims in the instant case, dismissing the petition, is in conflict therewith.

The Court of Claims has relied primarily on prior decisions of the Court of Claims (*Royal Holland Lloyd v. United States*, 73 C. Cls. 772 and *Morrisdale Coal Co. v. United States*, *supra*, 55 C. Cls. 310, *affd.* 259 U. S. 188), all of which appear to be clearly distinguishable. Moreover, the Court of Claims has not applied the proper legal tests for determining whether private property has been taken by the Government for a public purpose, as stated by this Court in a number of prior decisions, including, among others, *United States v. Causby*, *supra*, 328 U. S. 256; *United States v. General Motors Corporation*, *supra*, 323 U. S. 373.

In *United States v. Causby*, *supra*, this Court said:

“* * * It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U. S. 369. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United*

States v. Powelson, 319 U. S. 266, 275, and cases cited. If, by reason of the frequency and altitude of the flights [of government airplanes over respondent's chicken farm lands], respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

The opinion goes on to point out that an easement, either temporary or permanent, might be taken by flights of Government airplanes over respondent's farm land, saying (at page 262):

"* * * It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance * * * the land is appropriated as directly and completely as if it were used for the runways themselves. * * * enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of airspace immediately above the land would limit the utility of the land and cause a diminution in its value. * * *"

The opinion also recognized that the air space above the chicken farm of respondent, Causby, was a public highway and that respondent owned as much of the space

above the ground as he could use in connection with the land, and said further (at page 264):

“* * * The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. * * * The reason is that there would be an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it. * * *”

This Court adopted the philosophy of *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, saying (at page 265):

“In this case, as in *Portsmouth Company v. United States*, *supra*, the damages were not merely consequential. They were the product of a direct invasion of respondents’ domain. As stated in *United States v. Cress*, 243 U. S. 316, 328, ‘* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.’”

We respectfully submit that, by parity reasoning, the Court is warranted in holding that the character of the Government’s intrusion or invasion of petitioner’s right to the use of its pulp mill during the period from November 1, 1942 to April 1, 1944 was such that there was a taking of petitioner’s private property for a public purpose which is compensatory under the Fifth Amendment.

In the *Causby* case it was also noted (page 261, footnote 6) “That destruction of all uses of the property” has been held to constitute a taking of private property, citing

Pumpelly v. Green Bay Company, 13 Wall. 166; *United States v. Lynah*, 188 U. S. 445; *United States v. Welch*, 217 U. S. 333.

(3) In holding that there was no taking of private property because the pulp mill in a shutdown condition "was left in the hands of the plaintiff".

This holding, we respectfully submit, is in conflict with the long established rule that it is the private owner's loss, not the taker's gain, which is to be compensated (*United States v. Causby, supra*; *United States v. Powellson*, 319 U. S. 266, 281 and cases cited) and that "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking" (*United States v. General Motors Corporation, supra*, 323 U. S. 373, 378 and cases cited).

It cannot be doubted that as between private parties, for example, petitioner and a competitor, the acquisition by the competitor of the temporary use of petitioner's plant in order to shut it down so that the competitor's plants in the same area may continue in operation at full capacity in the manufacture of defense goods, and for that purpose have the right to take over petitioner's skilled employees and to consume petitioner's inventory and supply of essential raw material, would clearly be regarded as the acquisition of private property rights by the petitioner's competitor who would thereby become legally bound to pay petitioner fair compensation therefor. In effect, the order and directives of the War Production Board to petitioner constituted an acquisition by the Government of precisely the same private property rights which, in the supposed case, would have been acquired by

petitioner's competitor. The acquisition by the Government was for a public purpose, namely, the defense of the United States. The petition shows that the taking of petitioner's private property was intentional and that petitioner suffered substantial damages. On the facts alleged in the petition, therefore, we respectfully submit that a valid claim for compensation for the taking of private property for a public use has been sufficiently stated.

The recent case of *United States v. Dickinson*, 331 U. S. 745, decided June 16, 1947, was a suit under the Tucker Act to recover judgments for the value of easements taken by flooding land, for damages by erosion to parts of land and for an easement for intermittent flooding of parts of land. The Government objected that the claims were outlawed by the statute of limitations. This Court sustained a judgment allowing the claims and overruling the Government's objections, saying, among other things (at page 748):

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate and when they die. * * *

It is respectfully submitted that the "inroads" made by the Government upon petitioner's use of its pulp mill in the instant case constituted a "taking" in the constitutional sense.

(4) In holding that the petition "does not purport to so charge that it was the [War Production] Board's objective to shut down plaintiff's plant. * * * Its [the Board's] rejection of plaintiff's request to be permitted to convert [its mill] to the manufacture of nitrating pulp was directed neither toward the gaining of any control of plaintiff's plant nor toward the destruction of its ability to operate profitably, though it may have been aware that this latter would follow as a necessary consequence of its action." (R. 29, 30)

We respectfully submit that upon a fair reading of the petition as a whole it is clearly alleged that it was the purpose and intention of the Board to secure dominion and control over petitioner's pulpwood inventory as a "Reserve Supply" available for disposition by the War Production Board and to shut down petitioner's plant for the defense of the United States. The petition shows that in rejecting petitioner's protest the War Production Board admitted in writing to petitioner: "we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative." (R. 22). Adequate evidence of an intention of the Board to take petitioner's private property is further found in the specific directives to petitioner (R. 12 to 20, Exhibits B, C, D, E, F, G, H, I, and J annexed to the amended petition). The directives also show that the purpose of the War Production Board was to require petitioner's plant to be shut down so that the manufacture of nitrating and other pulps in the Puget Sound area could be concentrated in other plants designated by the Board. Thus, the allegations of the petition plainly negative the holding of the Court of Claims.

In passing upon the sufficiency of the allegations of the amended petition here and considering the legal effect of the drastic character of the order and directives of the War Production Board to this petitioner, we respectfully suggest that the allegations are to be weighed in relation to the purposes to be served by the Fifth Amendment and by having in mind the conditions under which modern total warfare is carried on. It is common knowledge that modern war involves a far greater use by the Government for public purposes than ever before of privately-owned manufacturing facilities. In considering this petition for a writ of certiorari, therefore, we believe it proper to invoke the doctrine stated by an eminent Justice of this Court that "Constitutions are intended to preserve practical and substantial rights, not to maintain theories" (Opinion of Holmes, J., in *Davis v. Mills*, 194 U. S. 451, 457, and recently cited in *United States v. Dickinson*, *supra*, 331 U. S. 745, at page 748).

(5) That the shutdown out-of-pocket expense and the loss of profits during the shutdown period was an incidental consequence of the respondent's acts for which there is no liability.

This holding appears to be in direct conflict with the views expressed by this Court that damages are direct and not merely consequential where the "intrusion" by the Government in the property rights of a private owner is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." (*United States v. Causby*, *supra*, page 265.) Here, as in *International Paper Company v. United States*, *supra*, the shutdown expense and the provable loss of profits are claimed as the measure of the fair value of

the property taken. No claim is made here for the taking of a business separate and apart from the special value of the temporary use of the petitioner's pulp plant and log inventory. Shutdown out-of-pocket expenses and loss of profits (if capable of proof) are proper elements in determining the just compensation for the taking of a privately owned mill property for a public use in a similar situation (*International Paper Company v. United States, supra*).

Reasons for the Petition

The writ of certiorari prayed for should be allowed for the following reasons:

(1) In sustaining the demurrer to the petition the Court of Claims has decided an issue in the instant case which is of great public importance. So far as we know, there has been no decision by this Court construing the broad powers granted by Congress under the provisions of the Second War Powers Act, 1942 which were invoked by the War Production Board in the situation alleged in the petition. Moreover, so far as we know, this Court has not previously had occasion to consider the effect of an order of the War Production Board of the character shown here.

Published records now available plainly indicate that the authorized representatives of the Government who were responsible for the issuance of General Preference Order M-251 and the specific directives thereunder entertained the view that the shutdown of petitioner's pulp mill would give rise to a claim for compensation.

The former General Counsel and Assistant General Counsel of the War Production Board have published

their views that the "M" series of orders of the Board were of such a drastic character in controlling the use of private properties and materials that they could have the effect of putting private companies out of business and present questions of the taking of private property for public use under the Fifth Amendment of the Constitution (see "The War Production Board Administrative Policies and Procedures" by John Lord O'Brian and Manly Fleischmann, 13 George Washington Law Review, December, 1944, No. 1, at page 29). It appears to have been the theory of the Board that private property would not be taken if the Board's order did not prohibit manufacture entirely and the use of a substitute material was permitted. In the instant case it clearly appears from the allegations of the petition that *all manufacture* at the petitioner's plant was prohibited and that *no substitute material* could be used. The instant case, therefore, presents the important question whether the actual application of the Board's order and its specific directives to the petitioner did not, in effect, accomplish the acquisition or requisition by the Government for war purposes of the temporary use of the petitioner's mill property and the personal property thereon and used therewith, as was permitted by the express provisions of the Second War Powers Act, 1942.

A public record prepared under the supervision of James W. Fesler, War Production Board Historian, entitled "Historical Reports on War Administration, War Production Board, Special Study No. 7, Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944", pages 61 to 68, shows that the Government action which resulted in the shutdown of petitioner's mill was initiated by the United

States War Manpower Commission at the instance of the War and Navy Departments as a war measure; that these Departments, by their spokesman, recommended for the pulp and paper industry "a policy of concentration in Washington and Oregon" in order that needed highly skilled employees might be made available; that in adopting such a policy the Director of the Office of Civilian Supply and Chairman of the Committee on Concentration of Production recognized that such a plan of necessity entailed "a scheme of compensation for the concentrated mills" (page 64). That public record further shows (at page 65) that three mills, including petitioner's, were proposed to be closed down; that petitioner's was the second largest scheduled for shutdown; that representatives of the largest mill strenuously objected to a shutdown on the ground that "it would face bankruptcy by the closing down", and that the program was revised to permit that mill to operate at 50% of capacity. Thus, the public record shows that the petitioner's mill was the largest mill shut down pursuant to General Preference Order M-251 and that 365 of petitioner's skilled employees were thereby released (page 65).

With regard to the "compensation" which the concentration program involved, it is further to be noted that in rejecting a suggestion of making the pulp mill shutdown program a "two bite" instead of a "one bite" program, the Historical Report states the following (at page 66):

"* * * the WPB concentration officials pointed out that since the concentration program involved compensation a 'two bite' program would be too difficult to handle. The 'one bite' program was because of U. S. insistence, agreed upon, and Gen-

eral Preference Order M-251 was issued by the Director General for Operations on October 26, making possible control of pulpwood in the shortage areas. * * *

Thus, the official historical record of the Government's acts which are the subject of the claim for compensation in the instant case establish beyond doubt that at the very time of the issuance of General Preference Order M-251 the Government officials responsible therefor recognized that the program would involve the obligation of the Government to make compensation to the mills affected by the shutdown order.

Admittedly, it would have been proper for the Government officials to have issued a requisition order expressly taking over the "temporary use" of the petitioner's pulp plant at an agreed "compensation", or pursuant to a procedure for the determination of the fair compensation at the time of the "taking". That, however, was not done and the important issues of "taking" of petitioner's private property for a public use and of the "fair compensation" payable therefor are now before the courts in the instant case for determination, as was apparently anticipated by the Government officials in charge of the matter in October 1942.

We respectfully submit, therefore, that this Court should allow the important question of law which the case presents to be reviewed on certiorari.

(2) The Court of Claims decided the important federal question under the Fifth Amendment to the federal Constitution in a way which conflicts with the decision of this Court in *International Paper Company v. United States*, *supra*.

(3) The Court of Claims decided the federal question involved here in a way directly in conflict with other applicable decisions of this Court, including (in addition to *International Paper Company v. United States, supra*), *United States v. General Motors Corp., supra*, *United States v. Causby, supra*, *United States v. Dickinson*, 331 U. S. 745, and cases cited therein.

Conclusion

The questions now presented are of real importance and the opinion and decision below appear to be in conflict with the decision of this Court in *International Paper Company v. United States, supra*. Accordingly, the petition for the writ of certiorari should be granted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Claims and submits herewith a certified transcript of the record in the Court below in support of this petition.

Respectfully submitted,

ST. REGIS PAPER COMPANY,

By HORACE R. LAMB,
Attorney for Petitioner.

Dated: June 2, 1948.

FILE COPY

Office Supreme Court,
FILED

AUG 20 1948

CHARLES ELMORE GROUP
CLE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. [REDACTED] 74

ST. REGIS PAPER COMPANY,
Petitioner,
v.
THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

HORACE R. LAMB,
Attorney for Petitioner.

August, 1948.

Table of Cases

	PAGE
<i>Hamilton v. Kentucky Distilleries Co.</i> , 251 U. S. 146, 156	11
<i>Hirabayashi v. United States</i> , 320 U. S. 81.....	11
<i>Home Building & Loan Association v. Blaisdell</i> , 290 U. S. 398	10
<i>International Paper Company v. United States</i> , 282 U. S. 399	9, 10, 12
<i>Lichter v. United States</i> , — U. S. —, 92 Supreme Court Law. Ed. Advance Opinions, page 1260, decided June 14, 1948.....	10
<i>Mugler v. Kansas</i> , 123 U. S. 623, 657	12
<i>Steuart & Bro. v. Bowles</i> , 322 U. S. 398.....	8, 9
<i>United States v. Causby</i> , 328 U. S. 256.....	12
<i>United States v. John J. Felin & Co., Inc.</i> , — U. S. —, 92 Supreme Court Law. Ed. Advance Opinions, page 1297, decided June 14, 1948.....	12
<i>United States v. Miller</i> , 317 U. S. 369.....	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 841

ST. REGIS PAPER COMPANY,
Petitioner,
v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

Respondent would have the Court view the question here presented as involving nothing more than the exercise of the President's "allocation" power under the Second War Powers Act, 1942. Throughout respondent's brief reference is made repeatedly to the exercise of the power to "allocate" materials. As its first ground for urging that the holding below accords with "established principles", respondent states (p. 6) that "*the allocation order here involved denying petitioner the pulpwood it needed to operate its plant was only one of hundreds of similar allocation orders affecting virtually all phases of*

industrial activity and business issued by various agencies of the Government during World War II, * * *". (Italics supplied.)

In its attempt to sustain that argument, respondent not only disregards the alleged facts and the official record of the acts of the responsible Government agency, but it also misrepresents the provisions of the War Production Board's General Preference Order No. M-251, the Schedule No. 1 thereto and the directives issued thereunder to this petitioner.

The petition in the Court of Claims shows that the War Production Board's General Preference Order No. M-251 provided for more than mere "allocation" of a scarce material. The petition further shows that the Order and directives to petitioner thereunder were expressly intended to have and they did have the effect of completely "shutting down" (R. 7) petitioner's mill, so that pulp production could be concentrated in other pulp mills designated by the Government agency (R. 6). As the direct result of the Government's actions petitioner was completely deprived of all use of its pulp mill in the manufacture of pulp, the only use to which it could be put, so that it became a valueless thing to petitioner (R. 6, 7).

In the petition for the writ of certiorari reference is made to the official publication of the "full and objective account of the way the Federal Government is carrying out its wartime duties" (see Foreword to "Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944, Historical Reports on War Administration: War Production Board, Special Study No. 7") which shows that the War Production Board's Order M-251 and the directives there-

under were issued pursuant to a policy of "concentration of production" in mills designated by the Government agency in the Puget Sound area in the state of Washington (see pp. 61 *et seq.*). That official record also shows that such a policy of "concentration of production" was recommended by the Army and Navy Departments in preference to the usual WPB policy of "horizontal curtailment" or "rationing" of material in order that "highly skilled" employees and other labor could be released (p. 61). For the convenience of the Court there is set out in an appendix to this brief extracts from pages 61 to 66 of that official record.

General Preference Order M-251, after describing various terms used in the Order, conferred four separate and distinct powers upon the Director General for Operations. Only the first of these, granted in clause (or subparagraph) (1) of section (or paragraph) (d), provided for "allocation of specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons". The "allocation" power of clause (1) was not invoked by the Director General against this petitioner. Schedule No. 1 to M-251, to be described shortly, was not issued pursuant to that clause.

Clause (2) of M-251 conferred power to "Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood * * * a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a 'Reserve Supply', available for disposition by the Director General for Operations, * * *."

If the Director General for Operations had invoked only the powers under clauses (1) or (2), obviously the shutdown of petitioner's pulp mill would not have occurred;

petitioner, presumably, would have received either its "allocated" quota of pulpwood pursuant to clause (1), or a directive pursuant to clause (2) to hold a stated portion of petitioner's accumulated inventory of pulpwood as a "Reserve Supply" available for disposition by the Government's agent, leaving the unrestricted balance of petitioner's pulpwood for petitioner's own use, and its mill would have continued in operation. In either of such events there would have been no taking of petitioner's private property.

General Preference Order M-251, however, contained two further important powers, neither one of which provided for "allocation", but both of which conferred "authorizations" to issue specific "directions" of such a prohibitory character that, when exercised as shown in the petition here, the exercise of the power actually amounted to a requisition of private property for a public purpose.

Clause (3) conferred upon the Director General for Operations the power to:

"(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction;"

The allegations of the petition to the Court of Claims clearly show that it was the power to prohibit the consumption or processing of pulpwood, conferred by the provisions of the clause quoted above, that was invoked by the Director General for Operations and applied

to petitioner's pulp mill. The record also shows that in issuing Schedule No. 1 to M-251 the Director General for Operations expressly stated that he was exercising the power conferred by the foregoing clause (3). In that schedule, after defining the so-called "area" and describing the "types of pulpwood", the directive read as follows:

"Pursuant to Clause (3) of the first paragraph of said section (d), the Director General for Operations hereby directs that on and after the day upon which this Schedule is issued, and until this Schedule is revoked, no holder of pulpwood as defined in Item (3) of Paragraph (d) of M-251, shall consume, process, or deliver any such pulpwood except upon specific authorization or direction by the Director General for Operations.

"Application for authorization or direction to consume, process or transfer such pulpwood may be submitted on Form PD-556.

"Issued this 23rd day of October, 1942.

ERNEST KANZLER

Ernest Kanzler

Director General for Operations"

The petition further shows that petitioner's mill was in the defined "area", that petitioner was regarded by the Government agent as a defined "holder of pulpwood", and that in a letter also dated October 23, 1942, addressed to petitioner (R. 12, 13, Exhibit B), the Administrator of General Preference Order M-251 wrote petitioner that the War Production Board was "invoking * * * clause (3) of paragraph (d) of said Order". With this letter there were enclosed directives "to deliver specified quantities of your supply of pulpwood logs to other companies

during the month of November, 1942" and authorizations "to consume and process out of your supply of pulpwood enough logs to complete production of the pulp tonnage approved for your mill, under M-93, for October, 1942."

The letter concluded with this very important statement to petitioner:

"* * * We regret that no authorization can be extended to you to consume pulpwood of the types defined in Schedule No. 1 for November; form PDL-667, confirming this, is enclosed." (R. 13)

The petition also shows that this complete prohibition of the petitioner's right to consume or process pulpwood of the types which were required to operate petitioner's mill was continued in effect until April, 1944 (R. 7), that petitioner protested that the direct effect of such prohibition would be to take petitioner's mill property at great financial loss to petitioner (R. 6, 7), that such protest was rejected (R. 7) and that the Board, by letter dated November 6, 1942, stated (R. 7) that:

"* * * we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative * * *."

It is therefore established by the record here that the powers of clause (d) (3) which the Director General invoked here were not the "allocation" powers of clause (d) (1) of M-251; that the directive power of clause (d) (3) to deny a pulp mill owner the right to "consume" or "process" any pulpwood, without which such mill would have no value whatever to the owner, was ex-

pressly regarded by the Government agent as including the power to "shut down" petitioner's mill, and the exercise of such power was, we submit, equal in effect to the power to requisition "the temporary use" of petitioner's pulp mill.

The powers conferred in clause (4) of M-251, while less broad than those of clause (3), could have a similar effect. That clause (4) conferred power to:

"(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. * * *"

The further sentences in this subparagraph show that M-251 expressly distinguishes between "allocation" and "authorization" and "directions", and that separate and distinct powers were conferred by subparagraphs (or clauses) (1), (2), (3) and (4) of section (d) of M-251.*

The respondent's reply brief fails to mention the distinction between the "allocation" power of paragraphs (d) (1) and (2) and the power to issue "authorizations and directions" under paragraphs (d) (3) and (4). The power to prohibit absolutely and completely the consumption and processing of the material essential to the opera-

* These sentences conferred power to require a particular manufacturer of woodpulp or other wood products to manufacture particular types and quantities of woodpulp or other wood products, or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. They provided that "allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, *may be made in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.*" (Italics supplied.)

tion of a mill is obviously not an "allocation" or rationing of a material, especially where, as here, the intent and effect of the Government's act was to take from the mill owner all right to operate petitioner's mill so that production of pulp could be concentrated in other mills designated by the Government and petitioner's skilled employees and other labor thereby released.

The official report of the acts of the responsible Government officers which led to the issuance of General Preference Order M-251, to which reference has been made above, clearly shows at pages 64 to 66* that these officers not only recognized the distinction between "allocation" and other "authorizations" and "directions", which were provided under M-251, but they expressly recognized that the "directives" which made effective the concentration of production in designated mills necessarily involved "compensation".

Since the authorized directive issued to this petitioner under General Preference Order M-251 was not the exercise of the power to "allocate" material, but an absolute and complete "prohibition" of the right to consume or process pulpwood (as well as "diversion" of certain quantities of pulpwood from petitioner's inventory), thereby depriving petitioner of all right to the use of its mill in the manufacture of woodpulp, it necessarily follows that all of the cases upon which respondent relies, which involve violations of allocation or rationing orders and attacks upon the constitutionality of the empowering statutes, have no bearing on the issue here presented.

This is not a case of routing a precious material by a Government agency from a "wasteful factory to an efficient one", so that the dicta from *Stewart & Bro. v.*

* See Appendix, pages 14 to 17.

Bowles, 322 U. S. 398 (quoted at page 8 of respondent's brief) has no application; and, moreover, the case here does not involve any question of the issuance of a "suspension order" for violation of a rationing provision, as did the *Steuart* case.

Respondent suggests (brief, page 5) that petitioner's claim is predicated upon a "novel theory" that when the Government agency prohibited petitioner from using or consuming something essential to the operation of petitioner's mill, the Government agency, in effect, requisitioned the use of petitioner's mill and thus took petitioner's property for a public purpose. We respectfully submit that the theory is not novel. It was precisely upon that theory that compensation, measured by the shutdown expenses of the paper mill, was allowed to the mill owner in *International Paper Company v. United States*, 282 U. S. 399. There, a Government agency, in the exercise of war powers, prohibited the International Paper Company from using water power which was essential to the paper mill's operation and directed that the water power be diverted to other manufacturing mills designated by the Government and engaged in the production of war materials. That action by the Government resulted in the complete shutdown of the paper mill. This Court reversed the Court of Claims' dismissal of the International Company's claim for compensation for the mill shutdown expenses and held that petitioner was entitled to such compensation under the Fifth Amendment.

The claim made in the case at bar is upon the same theory. Here the absolute prohibition of petitioner's right to consume and process an essential raw material, specified portions of which in petitioner's inventory were directed to other mills designated by the Government,

resulted in the complete shutdown of petitioner's mill. Thus here, as in the *International* case, the prohibition of the right to use something essential to the operation of the mill is, in effect, a taking of the use of the mill; and, as shown in the petition for the writ of certiorari, the Second War Powers Act, 1942, expressly authorizes the Government to acquire, for war purposes, "• • • any real property, *temporary use thereof*, or other interest therein, together with any personal property located thereon • • •." (Italics supplied.)

In citing *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, and cases arising under the Fourteenth Amendment (respondent's brief, pp. 7 and 8), to sustain the argument that "the power to wage war successfully" carries with it the power to cause "substantial financial loss and incidental damage", respondent fails to include the further quotation from the opinion in that case (290 U. S. 398, at p. 426):

"• • • But even the war power does not remove constitutional limitations safeguarding essential liberties. • • •"

And while it is true, as stated by this Court in *Lichter v. United States*, — U. S. — , 92 Supreme Court Law. Ed. Advance Opinions, page 1260, decided June 14, 1948, upholding the constitutionality of the renegotiation statutes, that "in total war private property and profits" must be yielded up to the demands of the Government for war purposes, we respectfully submit that where, as here, a mill owner has suddenly been compelled to shut down his mill completely and without any opportunity to adapt the mill for the manufacture of nitrating pulps for war purposes or to continue operations of the mill at a reduced rate, as was allowed other competing mills in the same area (R. 6), the severity of the Government's prohibition

is such that compensation under the Fifth Amendment should be paid (Cf. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 and cases cited).

In *Hirabayashi v. United States*, 320 U. S. 81, decided June 21, 1943, upholding the constitutionality of the Japanese segregation (curfew) military order and the subsequent confirmatory Act of Congress, it was said in the concurring opinion of Justice Murphy, at page 110:

"It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. (citing cases) We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. * * *

In the case at bar, it was said, in the opinion below (R. 30):

"This is a case of actual hardship. The damages are both real and substantial. But in the light of the decisions of the Supreme Court, the Tucker Act, and the established rules of law, this court does not have jurisdiction to grant the relief sought."

We respectfully submit that the Court below misapplied and misconstrued the applicable decisions of this Court and established rules of law, more fully pointed out in the petition for certiorari.

Finally, respondent argues (brief, page 9) that petitioner's claim is untenable because of the absence of "any showing that [petitioner's] plant did not remain at all

times within its own exclusive ownership, possession, and control, or that the Government had any semblance of ownership, possession, or use of the property' " and that because there was "no actual physical taking of any right in petitioner's property * * * petitioner's property was not 'taken' in the Fifth Amendment sense so as to entitle it to compensation thereunder."

The cases upon which respondent relies all involve entirely different situations and are, therefore, distinguishable. But the main defect in respondent's argument is that it ignores the established rule that, in enforcing the Fifth Amendment:

"* * * the question is what has the owner lost, not what has the taker gained." (*United States v. John J. Felin & Co., Inc.*, — U. S. —, 92 Supreme Court Law. Ed. Advance Opinions, page 1297, decided June 14, 1948; see also *United States v. Causby*, 328 U. S. 256, and *United States v. Miller*, 317 U. S. 369)

In conclusion we respectfully point out that this Court has previously recognized that a prohibition by Government action, although justified under a war or other emergency, which has the effect of preventing a mill owner from all operation of the mill property, deprives the owner of a valuable property right for which just compensation is payable under the Fifth Amendment (*International Paper Company v. United States*, *supra*; *Mugler v. Kansas*, 123 U. S. 623, 657).

The decision below is not only in conflict with prior decisions of this Court, but the question here presented is of such public importance that the petition for writ of certiorari should be granted.

Respectfully submitted,

HORACE R. LAMB,
Attorney for Petitioner.

August, 1948.

APPENDIX

Extracts from "Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944, Historical Reports on War Administration: War Production Board, Special Study No. 7".

Extracts from Pages 61 and 62.

"Concentration of production, which was at the time regarded by some officials as a possible panacea for most of the wartime production ills facing the Nation, had been approved as a policy by the War Production Board on July 21. Later events were to prove that while it was workable in a fairly small country, such as England, it was not adapted to the long distances and extremely complex structure of industry in the United States.

"On September 19 [1942], the War Manpower Commission urged the War Production Board to 'exert all possible efforts to utilize logging crews for the production of logs for lumber in order to meet the demand for an increased amount of lumber for essential war purposes' and recommended that production of non-essential wood-pulp be concentrated in areas outside of a 50-mile radius of Seattle, Bremerton, and Tacoma, in the State of Washington, and Portland, Oregon. Such concentration, the WMC stated, should preferably include the whole Northwest area, to free labor for the critical war industries there located. The War and Navy Departments joined with the WMC in recommending concentration, and Vice Admiral S. M. Robinson, in a letter to Donald M. Nelson, summarized the thinking at the time of those who favored concentration. He wrote:

'A policy of concentration is recommended for the pulp and paper industry in Washington and

Oregon, rather than horizontal curtailment. Horizontal curtailment entails the continued employment of maintenance men who are usually highly skilled and part-time employment of men who might otherwise be utilized full time in essential war work, and the continued use of equipment, material, fuel, transportation, and power. Concentration, on the other hand, would result in the maximum release of labor and other factors of production. Furthermore, a concentration program could be so framed that production would continue in those localities where the labor shortage is least acute. * * *

* * * 'It is suggested that by curtailing shipments of nonessential pulps to the East and reducing West Coast consumption, a significant portion of * * * labor could be released for employment in more essential activities. * * *

* * * 'It is therefore recommended that as many pulp and paper mills as consistent with the maximum war effort be shut down in the states of Washington and Oregon, for the purpose of releasing labor to vital war industries in these states.'

"The stage was now set for the evolution of Order M-251, concentrating pulpwood production in the Pacific Northwest. Regarded both as a measure to divert labor to the more vital war industries, and as a means of supplying essential pulps, it was made imperative by the fact that much more stringent measures intended to alleviate the general labor shortage in the West were in preparation. * * *

Extracts from Pages 64, 65 and 66.

"On October 12 [1942], Joseph Weiner, Director of the office of Civilian Supply, and Chairman of the Committee on Concentration of Production, reported that normally

he would oppose such a plan, [of concentration of production], entailing of necessity a scheme of compensation for the concentrated mills, but in view of the need for having the plan in operation before November 1, he reluctantly consented to the program.

"Original plans had been to close down three market mills: The Anacortes Pulp Company mill at Anacortes, Washington, which would release about 75 employees; the Puget Sound Pulp & Timber Company mill at Bellingham, Washington, which would release about 428 employees, and the St. Regis Pulp Company mill at Tacoma, Washington, which would release 365 employees. The Soundview Pulp Company and Weyerhaeuser Timber Company mills, both located at Everett, Washington, would be operated at 75% of capacity, with a release of about 185 employees.

"On October 16, a meeting was held with representatives of the pulp and paper industry from the Puget Sound area, with WPB, War Manpower Commission, and Committee on Concentration representatives in attendance. The following day a special meeting was held with the representative of the Puget Sound Pulp and Timber Company, who had not arrived in Washington in time for the October 16 meeting. As a result of a showing by this company that it would face bankruptcy by the closing down of its Bellingham mill, the program was revised, permitting the Bellingham mill of this company to operate at 50% of capacity, whereas the first plan had closed the mill.

"This required revision of the entire plan. The Tacoma mill of Rayonier, Inc., originally permitting a 75% operating level, was now closed down. The Everett mill of Soundview Pulp Company, and the Everett mill of Weyerhaeuser Timber Company, originally scheduled to operate at 75% of capacity, were permitted operating levels of 65% and 55% respectively. The closing of the Tacoma mill of Rayonier, Inc., had been made possible by agreement of the Army Ordnance Department to purchase nitrating pulp from the Longview mill of Weyerhaeuser

Timber Company up to full capacity. Essentially, the amount of labor released under the revision approximated that contemplated under the original plan—about 1,100 people. The War Manpower Commission was delegated the responsibility of seeing that the labor so released would actually be absorbed by the war industries.

“The concentration program had been discussed with the Canadian authorities, since it was part of the over-all pulp and paper curtailment program that would affect the economy of both countries. The Canadian authorities preferred what they called a ‘two bite’ instead of a ‘one bite’ concentration program, i.e., instead of closing the mills at once, to announce the ultimate goal to be reached and the mills to be closed, but to close the mills successively over a period of months. David Winton tended to agree with a Canadian position that an immediate drastic cut would have an adverse effect on the Canadian economy, *but the WPB concentration officials pointed out that since the concentration program involved compensation*, a ‘two bite’ program would be too difficult to handle. The ‘one bite’ program was because of U. S. insistence, agreed upon, and General Preference Order M-251 was issued by the Director General for Operations on October 26, making possible control of pulpwood in the shortage areas. (Italics supplied.)

“In accordance with the terms of this Order, the Director General issued, on October 26th, Schedule (1), defining the Puget Sound area as a critical area, and Schedule (2) defining the Columbia-Willamette area as a critical area. Pursuant to Schedule (1), he directed:

- “(a) The allocation of 51,350,000 board feet of pulpwood logs for consumption by pulp mills in the Puget Sound area for the month of November 1942; and
- “(b) The diversion of 4,000,000 board feet of pulpwood logs from pulp mills to lumber mills in the Puget Sound area for the month of November 1942.

"Three mills were closed (Anacortes Pulp Company, at Anacortes, Washington; Rayonier, Inc., at Tacoma, Washington; and St. Regis Paper Company, Tacoma, Washington) and the log usage of the other pulp and paper mills in the area was curtailed to the levels suggested in the concentration plan. Pursuant to Schedule (2) of the Order, 5,500,000 board feet of pulpwood logs were diverted from pulp mills to lumber mills in the Columbia-Willamette area for the month of November 1942.

"Order M-251 gave WPB the necessary authority for allocating pulpwood in shortage areas and for obtaining from the industry the data necessary for such allocations. *So far as the concentration principles of the order went, however, it was discovered, as it was later discovered in other industries, that the structure of the industry was too complex, and the size of the country too large, to permit effective concentration of any industry on a Nation-wide scale.*" (Italics supplied. Footnote references omitted.)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute and regulations involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	12

CITATIONS

Cases:

<i>Atwater & Co. v. United States</i> , 275 U. S. 188	9
<i>Block v. Hirsch</i> , 256 U. S. 135	6, 8
<i>Bowles v. Willingham</i> , 321 U. S. 503	6, 8
<i>Brown v. Wilemon</i> , 139 F. 2d 730, certiorari denied, 322 U. S. 748	8
<i>Gallagher's Steak House v. Bowles</i> , 142 F. 2d 530, cer- tiorari denied, 322 U. S. 764	8
<i>Gibson v. United States</i> , 166 U. S. 269	9
<i>Gray v. Commodity Credit Corp.</i> , 63 F. Supp. 386, af- firmed, 159 F. 2d 243, certiorari denied, 331 U. S. 842 ..	8
<i>Hamilton v. Kentucky Distilleries Co.</i> , 251 U. S. 146	6, 9
<i>Hirabayashi v. United States</i> , 320 U. S. 81	7
<i>Home Bldg. & L. Assn. v. Blaisdell</i> , 290 U. S. 398	7
<i>International Paper Co. v. United States</i> , 282 U. S. 399 ..	9
<i>Lichter v. United States</i> , No. 105, Oct. T. 1947, decided June 14, 1948	7, 9
<i>Morrisdale Coal Co. v. United States</i> , 55 C. Cls. 310, af- firmed, 259 U. S. 188	7
<i>Omnia Commercial Co. v. United States</i> , 261 U. S. 502 ..	6
<i>Portsmouth Co. v. United States</i> , 260 U. S. 327	9
<i>Royal Holland Lloyd v. United States</i> , 73 C. Cls. 722	7
<i>Scranton v. Wheeler</i> , 179 U. S. 141	9
<i>Shreveport Engraving Co. v. United States</i> , 143 F. 2d 222, certiorari denied, 323 U. S. 749	8
<i>Steuart & Bros. v. Bowles</i> , 322 U. S. 398	5, 7, 8
<i>Transportation Co. v. Chicago</i> , 99 U. S. 635	6, 9
<i>United States v. Carver</i> , 278 U. S. 294	6
<i>United States v. Causby</i> , 328 U. S. 256	9
<i>United States v. General Motors Corp.</i> , 323 U. S. 373	10
<i>United States v. Petty Motor Co.</i> , 327 U. S. 372	10
<i>Woods v. Miller Co.</i> , 333 U. S. 138	6, 8

II

Constitution and Statutes:

Constitution of the United States:	Page
Fifth Amendment	6, 10
Second War Powers Act (54 Stat. 676, as amended by 56 Stat. 177, 50 U.S.C. App. 633, 1152) Section 2(a) ..	3, 5, 12

Miscellaneous:

Executive Order No. 9125 (7 Fed. Reg. 2719)	3
O'Brian and Fleischmann, <i>The War Production Board Administrative Policies and Procedures</i> , 13 Geo. Wash- ington Law Rev. 1, 7	7
War Production Board's General Preference Order No. M-251 (7 Fed. Reg. 8424)	3, 12
Schedule 1 to Paragraph (d) (7 Fed. Reg. 8686) ..	4, 16

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 74

ST. REGIS PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 24-30) is reported at 76 F. Supp. 831.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 30). The petition for a writ of certiorari was filed on June 5, 1948. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether Schedule No. 1 to Paragraph (d) of General Preference Order No. M-251, issued by

War Production Board pursuant to the President's delegation to it of the allocation power vested in him by the Second War Powers Act, providing that no holder of pulpwood in the Puget Sound area "shall consume, process, or deliver any * * * pulpwood," constituted a "taking" of petitioner's pulpwood plant, located in that area, so as to entitle petitioner to just compensation under the Fifth Amendment.¹

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act (54 Stat. 676, as amended by 56 Stat. 177, 50 U.S.C. App. 633, 1152); of WPB General Preference Order No. M-251 (7 Fed. Reg. 8424); and of Schedule 1 to Paragraph (d) to that Order (7 Fed. Reg. 8686) are set forth in the Appendix, *infra*, pp. 12-19.

STATEMENT

By amended petition filed in the Court of Claims on January 8, 1948, the St. Regis Paper Company,

¹ Petitioner in its formulation of the question presented attempts to insert into the case the issue whether the United States should be required to pay just compensation for its inventory of pulpwood logs which it asserts was also requisitioned (Pet. 14). That question was not raised in the court below, and we submit, is not presented here. In the complaint filed below, the sole allegation relative to this inventory of logs is that petitioner was directed to deliver logs from its inventory to other mills (R. 6). The exhibits supporting this allegation indicate that petitioner was to be paid by the receiving mill "at regularly established prices and terms (subject to the regulations of the Office of Price Administration)" (R. 14-16). There is no allegation that petitioner complied with these orders, that it was not paid as there directed, or that these payments were not just compensation. Furthermore, the complaint contains no prayer for compensation for these logs.

the petitioner herein, sought to recover just compensation for an alleged taking of its pulpwood plant located at Tacoma, Washington (R. 1-23). The United States demurred (R. 23). The complaint alleged the following:

Petitioner owns a plant located in Tacoma, Washington, for the manufacture from pulpwood of approximately 300 tons of bleached and unbleached kraft pulp per day (R. 1). On October 26, 1942, the day on which the allocation order here involved was issued, and for some years prior thereto, petitioner was engaged in the business of manufacturing and selling bleached and unbleached kraft pulp, paper and other paper products (R. 1, 2). On that day, petitioner had at its plant an inventory of pulpwood logs, which is an essential raw material to its manufacturing process (R. 2). It also had a supply of these logs under contract for delivery for the continued operation of its plant at capacity production (R. 2).

In October 1942, the War Production Board, acting under Executive Order 9125 (7 Fed. Reg. 2719) delegating to it the allocation power vested in the President by Section 2(a) of Title III of the Second War Powers Act, Appendix, *infra*, p. 12, issued General Preference Order No. M-251, Appendix, *infra*, pp. 12-16, (R. 2-4). That order stated that the War Production Board was empowered to determine areas in which there existed a shortage of pulpwood required in the national

defense; to issue orders allocating and directing the distribution of the supply of pulpwood; and further to direct that certain persons to be specified might not consume, process, deliver, or accept delivery of such pulpwood (R. 3-4).

On October 26, 1942, the War Production Board issued Schedule 1 to Paragraph (d) of Order M-251, determining that there then prevailed in the Puget Sound Area in the State of Washington, the area in which petitioner's plant is located, a shortage of pulpwood needed for the defense of the United States (Appendix, *infra*, pp. 16-19; R. 5, 10-12). The schedule went on to provide that on and after October 26, 1942, and until the order should be revoked, no holder of pulpwood in that area was to "consume, process, or deliver any such pulpwood except upon specific authorization or direction" of the War Production Board (R. 5, 12). As a result, petitioner was not allowed to consume or process pulpwood in its plant from November 1, 1942 to April 1, 1944 (R. 7). Petitioner protested to the War Production Board against the application of this order to it, but its protest was rejected (R. 6-7). Petitioner accordingly had to shut down the plant during that period, since the plant could not be operated, or used for any purpose other than the manufacture of kraft pulp (R. 2, 7-8).

In its complaint in the court below, petitioner claimed this order constituted a temporary requisition of its plant for the use and benefit of the United

States, and contended that the Government had become obligated under the Fifth Amendment to pay, as just compensation for that taking, the out-of-pocket expenses it incurred during the shut-down period, the plant deterioration and depreciation charges, and the profits it failed to earn during that period (R. 8-9). The court below, in sustaining the demurrer of the United States (R. 30), held that petitioner's allegations failed to establish that its property had been taken (R. 25-30). Accordingly, it dismissed the complaint (R. 30).

ARGUMENT

Petitioner does not question that the power to allocate materials and facilities, which the Congress by Section 2(a)(2) of Title III of the Second War Powers Act, Appendix, *infra*, p. 12, vested in the President, involves a constitutional exercise of the war power, or that the delegation of that power to the War Production Board, the agency designated by the President to exercise that phase of the power here involved, was proper. Cf. *Steuart & Bros. v. Bowles*, 322 U. S. 398. Rather, petitioner's claim is predicated on the novel theory that when the War Production Board (and the various other agencies also designated to exercise that power in specific phases of the national economy²) exercised the power to allocate materials

² The War Food Administration, the Petroleum Administration for War, and the Office of Price Administration also allocated scarce materials.

in the interests of national defense and security, these agencies were engaged in requisitioning property from private individuals for public use, and that, therefore, the individuals denied materials by reason of such allocations to others are entitled to just compensation under the Fifth Amendment. The holding below rejecting that claim is, we submit, correct and in accord with established principles.

1. Although the allocation order here involved denying petitioner the pulpwood it needed to operate its plant was only one of hundreds of similar allocation orders affecting virtually all phases of industrial activity and business issued by various agencies of the Government during World War II, petitioner recognizes that there are no other cases in which the contention it advances here has been sustained (Pet. 28). There is good reason why no such cases are available, since the situation here involved is governed by the long established rule that when governmental power, such as the war power of the Federal Government or the police power of a state, is legitimately exercised for the public good, and injury is suffered as an incident thereto, there is no taking of property for public use compensable under the Fifth Amendment. *Block v. Hirsch*, 256 U. S. 135; *Bowles v. Willingham*, 321 U. S. 503; *Woods v. Miller Co.*, 333 U. S. 138; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155-158; *Omnia Commercial Co. v. United States*, 261 U. S. 502; *United States v. Carver*, 278 U. S. 294; *Trans-*

portation Co. v. Chicago, 99 U. S. 635; *Morrisdale Coal Co. v. United States*, 55 C. Cls. 310, 316, affirmed, 259 U. S. 188; *Royal Holland Lloyd v. United States*, 73 C. Cls. 722.

The allocation orders issued during World War II were designed to effectuate the distribution of scarce materials and products of all kinds among competing military and civilian demands and to insure the prompt, efficient, and adequate flow of shortage materials to the armed forces, to our allies, and to the home front. In order to attain these objectives, it was often imperative to withdraw or reclaim allocations granted, or to reallocate because of a changed military situation or a change in legitimate consumer demands. See Brief for Respondents in *Steuart & Bros. v. Bowles*, No. 793, Oct. T., 1943, pp. 18-21; O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. Law Rev. 1, 7.³

Although these allocation orders affected normal peacetime activities and resulted in some instances in very substantial financial losses, such damages were only incidental to the overall objective of so organizing our economy as to enable the United States to "wage war successfully." *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426; *Hirabayashi v. United States*, 320 U. S. 81, 93; see

³ Contrary to petitioner's suggestion (Pet. 29), the authors of this article did not express the view that the allocation orders issued by the War Production Board, including the "M" series here involved, resulted in a taking of private property for public use compensable under the Fifth Amendment.

Lichter v. United States, No. 105, Oct. T. 1947, decided June 14, 1948. Any financial losses which ensued were "damnum absque injuria * * * private interest has merely come into collision with a public interest, and has had to yield." *Brown v. Wilemon*, 139 F. 2d 730, 732 (C.C.A. 5), certiorari denied, 322 U. S. 748; cf. *Gallagher's Steak House v. Bowles*, 142 F. 2d 530 (C.C.A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co. v. United States*, 143 F. 2d 222 (C.C.A. 5), certiorari denied, 323 U. S. 749; *Gray v. Commodity Credit Corp.*, 63 F. Supp. 386, 396 (S. D. Cal.), affirmed, 159 F. 2d 243 (C.C.A. 9), certiorari denied, 331 U. S. 842; see also, *Block v. Hirsch*, *supra*; *Bowles v. Willingham*, *supra*; *Woods v. Miller Co.*, *supra*. As was pointed out in *Steuart & Bros. v. Bowles*, *supra*, at 405:

Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

Or, again, as this Court said just the other day in *Lichter v. United States*, *supra* (p. 11 of slip opinion:

In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.

2. Petitioner's claim is also untenable for the reason that there was no actual taking of any right in its property. As pointed out by the court below, there is a complete absence of "any showing that [petitioner's] plant did not remain at all times within its own exclusive ownership, possession, and control, or that the Government had any semblance of ownership, possession, or use of the property" (R. 29). Accordingly, there was no actual physical taking of any right in petitioner's property, and hence petitioner's property was not "taken" in the Fifth Amendment sense so as to entitle it to compensation thereunder. *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *Gibson v. United States*, 166 U. S. 269, 275-276; *Scranton v. Wheeler*, 179 U. S. 141, 154-155; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156-157; *Atwater & Co. v. United States*, 275 U. S. 188, 190-191.⁴

⁴ The various cases cited by petitioner, such as *United States v. Causby*, 328 U. S. 256; *Portsmouth Company v. United States*, 260 U. S. 327, and *International Paper Co. v. United States*, 282 U. S. 399 (Pet. 17-23), are all distinguishable since in each of these cases there was an actual taking of an interest in the plaintiff's property.

Nor is there any substance to petitioner's further contention that since Schedule 1 forbade it to consume, process, or deliver any pulpwood and it was thus compelled to shut down its pulpwood plant, the plant not being usable for any other purpose except storage, there was such a destruction of its "rights to process and consume pulpwood" (R. 8) and to use and operate its plant as to amount to a "taking" compensable under the Fifth Amendment (Pet. 24). For the "destruction" rule applies, as stated in *United States v. General Motors Corp.*, 323 U. S. 373, 378, only when the effects of the governmental action short of acquisition of title or occupancy are so complete as to deprive the owner of all or most of his interest in the subject matter. Cf. *United States v. Petty Motor Co.*, 327 U. S. 372. Here all that the Government did was to forbid petitioner to acquire or process pulpwood and this denial merely resulted in the closing down of petitioner's plant. Neither all or any part of petitioner's plant was destroyed, nor was petitioner's exclusive possession or occupancy thereof disturbed at any time during the period of the alleged taking. In these circumstances, there clearly was no such destruction of petitioner's plant as to amount to a "taking" compensable under the Fifth Amendment.

CONCLUSION

The decision below is clearly correct, and there is no conflict with any applicable decision of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

JULY 1948.

APPENDIX

1. The Second War Powers Act, 54 Stat. 676, as amended by 56 Stat. 177, 50 U.S.C. App. 633, 1152, provided in pertinent part:

Sec. 2(a) * * * * *

(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

2. General Preference Order No. M-251 of the War Production Board (7 Fed. Reg. 8424) provides in pertinent part:

The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote national defense:

§ 3113.1 *General Preference Order M-251-*
(a) *Applicability of priorities regulations.*

This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(b) *Definitions.* For the purpose of this order:

(1) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

(2) "Pulpwood" includes wood of any species and in any form commonly delivered to a manufacturer of woodpulp for the manufacture of woodpulp, except those species and forms defined in and subject to the following orders of the War Production Board: M-186, M-228, M-229 and M-234.

(3) A "holder of pulpwood" is any person who holds or accumulates pulpwood for manufacture by himself into woodpulp.

(4) To "hold" or "accumulate" pulpwood means to have or obtain control of a supply of pulpwood whether by production or purchase directly by the holder, by production or purchase by an affiliate or subsidiary or by one branch, division or section of a single enterprise or by production or purchase by any other person for delivery to or for the account of the holder.

* * * * *

(d) *Control of pulpwood in areas of shortage.* Whenever the Director General for Operations determines that there prevails in any area a shortage in the supply of any type or types of pulpwood required for the production of materials needed in the public interest and for national defense, he may issue a schedule defining such area and such type or types of pulpwood, and may thereupon, according to the degree of the shortage and the immediacy of the need, and as specified in such schedule,

(1) Allocate specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons;

(2) Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood of the type or types defined a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a "Reserve Supply", available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quantities into the specific products, and the Director General for Operations may in addition from time to time allocate specific quantities of any pulpwood of the type or types defined held or accumulated in such area, although not a part of such "Reserve Supply", from and to specific persons; and provide procedures for applying for and

granting such authorizations, directions and allocations;

(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction; and/or

(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. In any allocation, authorization or direction issued by the Director General for Operations pursuant to clause (1), (2) or (3) of the foregoing paragraph, the Director General for Operations may require the person to whom such allocation, authorization or direction is issued to manufacture, from the pulpwood which is the subject thereof, particular types and quantities of woodpulp or other wood product or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. Such allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, may be made

in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.

3. Schedule 1 to Paragraph (d) of Order No. M-251 (7 Fed. Reg. 8686) provides:

§ 3113.2 *Schedule 1 to paragraph (d) of General Preference Order M-251.* Pursuant to paragraph (d) of General Preference Order M-251, the Director General for Operations hereby determines that there prevails in the following area a shortage in the supply of the following type(s) of pulpwood required for the production of materials needed in the public interest and for national defense:

Area. That portion of the State of Washington, known as the Puget Sound area, which is described as follows: bounded on the West by the Pacific Ocean, bounded on the north by the Canadian Border, bounded on the east by the crest of the Cascade Mountain Range and bounded on the south by a line having the following course: east from the Pacific Ocean along north boundary of township 11 to range line between Townships 7 and 6 East; then south 3 miles; then east through Range 6 to

Pacific County line; then south along Pacific County line to southern boundary of Lewis County line; then east along southern boundary of Lewis County line through Ranges 5 West and 4 West, and east 3 miles to center of Range 3 West; then north 3 miles through Range 3 West; then east through remainder of Range 3 West and through Range 2 West; then north on the range line between Range 2 West and Range 1 West to northern boundary of Township 11; then east along northern boundary of Township 11 through Range 1 West, Range 1 East, and Range 2 East; then south 3 miles on range line between Range 2 East and Range 3 East; then east through the center of townships in Ranges 3, 4 and 5 East; then south 3 miles to southern boundary of Lewis County line; then east on Lewis County line to the crest of the Cascade Mountain Range.

Type(s) of pulpwood. All grades and sizes of pulpwood logs of the following species (excepting cants, slabs or other sawmill waste):

(1) True firs of the botanical species: *Abies grandis* (white fir), *Abies Lasiocarpa* (balsam fir), *Abies amabilis* (silver fir) and *Abies concolor* (white fir).

(2) Sitka spruce of the botanical species: *Picea sitchensis*, except those grades of logs specified by the War Production Board under General Preference Order M-186 as "Sitka spruce logs, Grades No. 1 and 2 and cants and flitches of such logs". General Preference

Order M-186 defines "Grades No. 1 and No. 2, Sitka spruce logs" as such grades as understood in the particular district on August 1, 1941.

(3) Engelmann spruce of the botanical species: *Picea Engelmannii*.

(4) Western Hemlock of the botanical species, *Tsuga heterophylla* and *Tsuga mertensiana*, except the log grade specified by the War Production Board under General Preference Order M-229 as "Western Hemlock aircraft logs". General Preference Order M-229 defines "Western Hemlock aircraft logs" as "Logs of the botanical species of *Tsuga mertensiana* or *Tsuga heterophylla* (including cants and flitches of such logs), which are produced in those parts of Oregon and Washington lying west of the crest of the Cascade Mountain Range, or in Alaska, and which meet the following specifications:

(i) Are from stands of timber of approximately 1,200 feet or higher elevation and are medium to light in weight;

(ii) Are not less than 26 inches top diameter and not less than 12 feet long;

(iii) Are of straight grain so that the majority of the clear lumber can be produced with a slope of grain not greater than 1 in 15;

(iv) Are free of deep bark seams or other defects with the clear portion of the log;

(v) Have reasonably uniform annual rings, not fewer than eight to the inch within the clear portion of the log; and

(vi) Are of a character which will produce at least 50% No. 2 Clear and Better, or B and Better Clear lumber”.

Pursuant to subparagraph (3) of paragraph (d) of said order, the Director General for Operations hereby directs that on and after the day upon which this schedule is issued, and until this schedule is revoked, no holder of pulpwood, as defined in subparagraph (3) of paragraph (b) of M-251, shall consume, process, or deliver any such pulpwood except upon specific authorization or direction by the Director General for Operations.

Application for authorization or direction to consume, process or transfer such pulpwood may be submitted on Form PD-556.